THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

Central Division

In re BRIAN A. KITTS, Debtor.	BK Case No. 05-27158 JAB Chapter 7
J. KEVIN BIRD, Chapter 7 Trustee, Plaintiff, vs. WINTERFOX, LLC, Defendant.	Adversary Proceeding No. 06-02250

FILED
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DISTRICT OF UTAH

FULL TRANSCRIPT

TRIAL

December 1, 2009

VOLUME I

BEFORE THE HONORABLE JUDITH A. BOULDEN

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George Bybee	30	55		
Aaron Olivarez	56	116	125, 142	139
Russell Walker	145	149		
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* * * * *

SALT LAKE CITY, UTAH, TUESDAY, DECEMBER 1, 2009, 9:04 A.M.

* * * * *

(Called to order the Court.)

THE COURT: Would you call the calendar, please.

THE CLERK: This is in the matter of Brian Arthur Kitts, Bird vs. Winterfox, LLC.

THE COURT: Would parties note their appearances.

MS. BOULEY: Adam Affleck and Aaron Millar for Chapter 7 Trustee, Kevin Bird.

MR. JUBBER: Your Honor, Gary Jubber and Sara Bouley, Fabien Clendenin, on behalf of Winterfox.

THE COURT: All right. This matter has been scheduled for trial today. I know that there are several motions that are pending as motions-in-limini. The parties are also aware that the scheduling order imposed time limits in the case, and those time limits will be enforced as to opening and closing arguments and evidentiary presentation. You may check with Ms. Freeman at any time during the proceeding to see what the timing is that we have, and if you don't use all of the time for your opening arguments, you may apply it to the time that you've indicated for your evidentiary presentation.

There are five motions-in-limini that have been filed. I have reviewed those motions-in-limini. I don't need for their oral argument on the motions-in-limini, and will make rulings at this point on the record regarding those motions-in-limini.

The Defendant has filed a motion-in-limini to exclude the expert testimony of Rob Cartrell concerning the availability of other loans. That section of his expert testimony regarding the hypothetical that is based in part on the $30,000 per month income, I have reviewed that and will deny that motion-in-limini. That matter will be considered by the Court and will not be stricken.

The motion-in-limini also filed by the Defendant under Rule 37(c) to exclude evidence with respect to damages and dismissal of damage claim pursuant to 15 USC §1640(a)(1) and (a)(4) that is Docket No. 251 on the docket, this is the motion-in-limini that gives me the most polis; but after due consideration, I'm going to grant that motion, but only in part.

I will allow the Estate to present their damage claims based upon the July and the August supplements that were filed by the Trustee, but excluding, is an odd way to put it, excluding the asterisk. In the August 25th, 2009, second supplement there is a reference to interest and in the exhibit to that supplement there is a chart of actual damages for mortgage loans Brian Kitts had paying from Winterfox LLC with an asterisk. That asterisk refers to the following.

"If Brian Kitts is required to pay extension fees and pre and post-petition interest to Winterfox, such fees and interest will also be factored into the actual damages asserted by the Trustee." That's stricken. There's no calculation for that, and to the extent that the motion-in-limini covers that, that portion of the motion-in-limini is granted.

The motion-in-limini to exclude evidence on timely disclose, which is Docket No. 249 filed by Winterfox, is granted. The motion-in-limini to exclude the expert report and testimony of Roger ++Kater, who was the title expert that has been filed by the Estate, is denied. The motion-in-limini to exclude the third opinion in the expert report and testimony of David Luna is granted.

All right. Would you present your opening statements.

MR. AFFLECK: Good morning, Your Honor. Adam Affleck for Kevin Bird. The evidence in this case, Your Honor, will show that in December 2004 the Debtor Brian Kitts was facing foreclosure on his home from three lien creditors, and that he needed funds on an emergency basis to refinance those loans and save his home from foreclosure. He hired a mortgage broker named Michael Falk. Michael Falk, in turn, contacted another mortgage broker named Aaron Olivarez. Aaron Olivarez worked for Winterfox or found loans for Winterfox.

Winterfox was a hard-money lender that did not have a license to do residential mortgages in the State of Utah. Notwithstanding that fact, Winterfox agreed to make two loans -- or one loan, actually, that ended up being two loans on -- to Mr. Kitts secured by his residence; a loan of 1,350,000 on December 8th and another loan of $39,603.47 a few weeks after.

Mr. Kitts defaulted on these loans, they were short-term loans, failed to pay, and Winterfox threatened to file an illegal deed in lieu of foreclosure that they had obtained in connection with these loan transactions. Mr. Kitts, believing that Winterfox could record those deeds without going through the foreclosure process, filed a bankruptcy to prevent it.

After he filed his bankruptcy through his counsel, Mr. Kitts requested that Winterfox provide him with the Truth In Lending Act disclosures that were required to be given to him at the time the loans were made. The evidence will prove that Winterfox did not make those disclosures, did not send those disclosures at the time of the loans, but made them up after the fact. The evidence will further show that Winterfox's agents have perjured themselves to conceal its failure to give those in a timely manner.

The evidence will further show that even if the disclosures that Winterfox claims to have been given in a timely manner were, in fact, given, those disclosures were defective under the requirements of TILA.

Winterfox will attempt in this trial to show that its fraudulent conduct is immaterial by arguing that Kitts got the loans for a business purpose. To support their claim of a business purpose, Winterfox will point to undisputed facts that Mr. Kitts' home, legal title to his home was held in Sun Peak both before and after the loans were paid. Notwithstanding this fact, Your Honor, the undisputed facts will show that the loans were, indeed, for a consumer purpose.

No matter who the property is titled in, the evidence will show, and this will be undisputed evidence, will show that Brian Kitts and his family lived in the home. It was where they slept, it was where they had family dinners, it was where they celebrated holidays, it was where their children came home after school. The evidence will show that the purpose of this loan was to save that family dwelling from foreclosure, and the evidence will further show that Winterfox understood this fact.

It will be shown by, among other things, Your Honor, the disclosures that Winterfox prepared after the fact showing and indicating that this property was Mr. Kitts' family residence. To the extent that title is relevant to the purpose of the loan, why Mr. Kitts got this loan, the evidence will show that at the time the loans were obtained, it was Mr. Kitts who held legal title to the property. The evidence will also show that the proceeds of the loan were used to pay off liens on the property that had been incurred both for a consumer purpose and a business purpose, mixed purposes, but that more than 50 percent of those loans were for family, household and personal purposes, thus, satisfying the requirement under TILA that a consumer debt be "primarily for consumer purposes."

Finally, the evidence will show the Trustee's entitlement to damages. The actual damages which are the difference between the loan that Mr. Kitts got and the loan that he could have got had he received the disclosures and had adequate opportunity to shop the loan, statutory damages of $4,000 per loan, attorneys' fees, and based on the Court's ruling to the extent finance charges have been paid, finance charges in the amount of $87,000.

Thank you, Your Honor.

THE COURT: Ms. Bouley.

MS. BOULEY: Thank you, Your Honor. This is a case where the Trustee is standing in the shoes of the Debtor as attempting to use alter ego as a sword rather than as a shield. He is attempting, in effect, to reverse pierce by arguing that an asset that the Debtor had held out as a corporate asset for many years and which the Debtor was desperate to save from foreclosure was, when it suits his interest for TILA purposes, suddenly a personal asset.

In December of 2004 Sun Peak, one of Mr. Kitts' companies, was facing foreclosure of its primary asset. The property that is at issue in this case. Sun Peak had used this property for many years, and had pulled money out of the property on several occasions to finance its business operations. Sun Peak had filed bankruptcy and had listed this asset, the subject property, on its federals as its primary asset. That bankruptcy was dismissed only a few months before this loan was made. Or, at least, 14 months prior to the loan made by Winterfox, the property was titled in Sun Peak's name. It was also titled in Sun Peak's name for another six -- five to six months after the transaction.

It was transferred into Mr. Kitts' name, the property, for only a brief minute on December 10th of 2004 of record, and again on March 1st, 2005, and then immediately conveyed back to Sun Peak and remained in Sun Peak's name of record until June of 2005 after this bankruptcy case had already been filed. So based upon these two minutes out of 20 months, the Trustee, being Mr. Kitts, is attempting to argue that this was a personal asset, in effect trying to collapse a corporation into Mr. Kitts and trying to characterize what was clearly a loan to save a business asset as a consumer transaction.

Furthermore, the Trustee will try to show that the loan was used to pay off primarily consumer debt when, in fact, his math is fundamentally flawed. He will go to great lengths to show that Washington Mutual, Wells Fargo and the Ed Ingram Construction judgment, which were paid off by the Winterfox proceeds, were primarily consumer in nature, but, in fact, the evidence will show otherwise.

For example, the Ed Ingram Construction judgment was against Sun Peak, yet the Trustee will try to allocate that judgment entirely as personal. All work done by Mr. Ingram was done while Sun Peak -- while Sun Peak was the owner of the property. It was a Sun Peak debt. Similarly, the allocation for Washington Mutual is flawed.

The Trustee will argue that about $277,000 that was pulled out of the equity of the subject property and used to purchase what can only be considered an investment property, as far as Mr. Kitts is concerned, is somehow personal. The Trustee will also argue the property taxes for 2001 accrued -- that accrued while Sun Peak owned the property is personal when, in fact, it was a Sun Peak debt. Also, the Wells Fargo debt was more business than personal. The evidence will show that at least $65,000 of the amounts the Trustee is claiming as consumer debt was actually deposited into Sun Peak's corporate bank account. When all is said and done, the evidence will show that the funds were used

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primarily to pay off business obligations, not personal loans.

Thus, TILA, the Truth In Lending Act, does not apply because the Winterfox loan was not primarily for personal, family or household purposes. TILA doesn't apply for other reasons as well, as the evidence will show. First, Winterfox did not originate this loan. The loan was presented to Winterfox. Secondly, there was no broker involved. Mr. Aaron Olivarez was licensed as a loan officer and cited as a -- and was a consultant to what -- to Winterfox and nothing more.

The Trustee will try to get around the fact that there was no broker by arguing that there were two loans, but the evidence will show that there was really only one loan ever intended, and that the so-called second loan was made necessary only because there was the shortfall in the first -- in the first amount. And the reason there was a shortfall in the first amount was that Mr. Kitts himself requested additional funding to pay off what appears to be an unsecured obligation to another one of his companies, NevWest, and that necessitated the second loan.

Now the Trustee will attempt to make much of the fact that disclosures were prepared and sent to Mr. Kitts. This is a big red herring for several reasons. First of all, Winterfox is not claiming anything by way of these disclosures. Winterfox stipulates here and now that the disclosures were not adequate and did not satisfy TILA. Winterfox's position is that TILA does not apply because it was a consumer transaction, but even more importantly the disclosures are a red herring because Mr. Kitts admittedly never received them.

That is the Trustee's position, as stated in his trial brief, and we do not contend otherwise. So the Trustee's alleged -- alleged nefarious conduct is meaningless, as the Trustee himself states on page 11 of his trial brief. "Whether the Court ultimately determines Winterfox made timely notices and disclosures or fraudulently made them up after the fact will be shown to matter little." Well said. They matter very little. In fact, not at all, because Mr. Kitts never got them. All they alleged fraud in the world doesn't amount to anything unless it is, in fact, communicated to the intended recipient. And the only issue in this case is whether TILA does apply and whether Winterfox is liable for any damages.

Now, turning to damages, if the Court were to find that TILA applies, the Trustee cannot show any actual damages under 16(a)(1) or under (a)(4). First, with respect to 1640(a)(1), in its brief and other papers, the Trustee has repeatedly cited the Parem v. GMAC case from the 5th Circuit. In that case the Court stated that few, if any, TILA plaintiffs are proven or can prove actual damages, and this case is no exception. As the Parem case really holds, there has to be detrimental reliance, and there was none here; hence, Mr. Kitts did not read the loan documents because he did not bring his glasses to the closing even though he knew he would be signing loan documents for a loan in well excess of a million dollars. Mr. Kitts could not have relied.

Furthermore, there was no other loan available at the time. In fact, Mr. Kitts was in a panic and Mr. Falk, that he had used for years to help him get loans, had been working on trying to find him conventional financing for some time, and this was the only loan available to Mr. Kitts. There were no actual damages. The loan saved Sun Peak's property from imminent foreclosure. But for the loan, the property would have been lost. So on the contrary to being damaged, Sun Peak's asset -- principal asset was saved, but I suppose no good deed goes unpunished.

Furthermore, as stipulated in the uncontroverted facts, Mr. Kitts has never made a single payment on this loan, has never paid so much as a dime, and it has now been five years. He did not pay anything out of pocket at the closing, and he has paid nothing since. He has been living in the property for five years without paying a thing.

Turning to (a)(4), the statute clearly states that only finance charges and fees actually paid by the consumer are recoverable. The law is clear that only amounts which the consumer has come out of pocket are recoverable. Here there are none. And so for these reasons, Your Honor, we think that the evidence will show in the end that this is not a consumer transaction, that TILA does not apply, and that there are no damages available to the trustee. Thank you.

THE COURT: Thank you.

All right. Mr. Affleck, are you ready to present your evidence?

MR. AFFLECK: Yes, Your Honor.

THE COURT: All right. You've submitted to the Court the Trustee's Objections to Winterfox's Exhibits and Winterfox's Objections to The Trustee's Exhibit List. Am I to take it from those documents that you're stipulating to the admissibility of the documents that aren't objected to?

MR. AFFLECK: For the Trustee, Your Honor, the objections that we reserve on those would be relevance and waste of time; but, otherwise, yes.

THE COURT: I don't know what that means, Mr. Affleck. Are there any documents that the parties are stipulating can be received into evidence?

MR. AFFLECK: Yes, there are.

THE COURT: What ones?

MR. AFFLECK: Your Honor, if I can just go through those. For the Trustee's exhibit -- exhibits, Exhibit No. 1, Exhibit No. 2, and we would offer these exhibits at the same time, Your Honor, if Court would indicate whether they are received. Exhibit No. 1, Trustee would offer that exhibit.

THE COURT: Is there any objection?

MS. BOULEY: No, Your Honor.

THE COURT: All right. If I don't hear an objection from you, I'm just going to receive it. All right?

MR. AFFLECK: Exhibit No. --

THE COURT: Exhibit 1+ is received.

MR. AFFLECK: Exhibit No. 2.

THE COURT: Exhibit 2+ is received.

MR. AFFLECK: Exhibit 3.

THE COURT: Exhibit 3+ is received.

MR. AFFLECK: Exhibit 13.

THE COURT: Exhibit 13+ is received.

MR. AFFLECK: Exhibit 14.

THE COURT: Exhibit 14+ is received.

MR. AFFLECK: 15.

THE COURT: Exhibit 15 is received.

MR. AFFLECK: 17.

THE COURT: Exhibit 17+ is received.

MR. AFFLECK: 20.

THE COURT: Exhibit 20+ is received.

MR. AFFLECK: 22.
THE COURT: Is that 22A?
MR. AFFLECK: 22A. Thank you, Your Honor.
THE COURT: Exhibit 22A+ is received.
MR. AFFLECK: 22C.
THE COURT: Exhibit 22C+ is received.
MR. AFFLECK: 28A.
THE COURT: Exhibit 28A+ is received.
MR. AFFLECK: 28C.
THE COURT: Exhibit 28C+ is received.
MR. AFFLECK: 29.
THE COURT: Exhibit 29+ is received.
MR. AFFLECK: 30.
THE COURT: A?
MR. AFFLECK: 30A.
THE COURT: Exhibit 30A+ is received.
MR. AFFLECK: 30B.
THE COURT: Exhibit 30B+ is received.
MR. AFFLECK: 36A.
THE COURT: Exhibit 36A+ is received.
MR. AFFLECK: 36C.
THE COURT: Exhibit 36C+ is received.
MR. AFFLECK: 39A.
THE COURT: Exhibit 39A+ is received.
MR. AFFLECK: 39C.

THE COURT: Exhibit 39C+ is received.
MR. AFFLECK: 45A.
THE COURT: Exhibit 45A+ is received.
MR. AFFLECK: 45B.
THE COURT: Exhibit 45B+ is received.
MR. AFFLECK: 47A.
THE COURT: Exhibit 47A+ is received.
MR. AFFLECK: 47C.
THE COURT: Exhibit 47C+ is received.
MR. AFFLECK: 48A.
THE COURT: Exhibit 48A+ is received.
MR. AFFLECK: 50.
THE COURT: Exhibit 50+ is received.
MR. AFFLECK: 51.
THE COURT: Exhibit 51+ is received.
MR. AFFLECK: 54.
THE COURT: Exhibit 54+ is received.
MR. AFFLECK: 56.
THE COURT: Exhibit 56+ is received.
MR. AFFLECK: 58.
THE COURT: Exhibit 58+ is received.
MR. AFFLECK: 60. 60.
MS. BOULEY: We have an objection to 60, Your Honor.
THE COURT: The objection's were hearsay, authenticity and foundation. That is a payoff statement from Wamu loan

dated 12-31-04?

MR. AFFLECK: Is that -- is that not the same thing? Is that not the same thing?

MR. MILLAR: That is the same thing.

MR. AFFLECK: Is this the same thing as this?

MR. MILLAR: Yeah.

MR. AFFLECK: May I have just a moment, Your Honor. I think that Winterfox has stipulated to this exhibit, but let me check with counsel for a moment.

THE COURT: Have we resolved the issue?

MR. AFFLECK: It appears, Your Honor, that it has been -- it's part of the Stipulation For Admission of Exhibits that was filed, and I think Winterfox is still trying to confirm that.

THE COURT: Is the document listed more than once, because it's listed T60 with a document filed with the court. Is it listed as objected to?

MS. BOULEY: Yes, Your Honor. That's what I'm trying to . . .

THE COURT: Well, perhaps we can resolve it at a break.

MS. BOULEY: Yes. We'll do that. Thank you, Your Honor. Sorry.

THE COURT: All right.

MR. AFFLECK: Exhibit 64.

THE COURT: Exhibit 64+ is received.

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MR. AFFLECK: Those are the Trustee's exhibits that have been stipulated to by Winterfox, Your Honor.

THE COURT: All right. Do you wish to go forward with your exhibits now or do you wish to wait until your case? Ms. Bouley, do you want to wait or do you want to do it now?

MS. BOULEY: No, Your Honor. I think we can go ahead.

THE COURT: All right.

MS. BOULEY: Winterfox Exhibit 5 -- 501. That's actually --

THE COURT: 501+ is received.

MS. BOULEY: 502.

THE COURT: 502+ is received.

MS. BOULEY: 503.

THE COURT: 503+ is received.

MS. BOULEY: 504.

THE COURT: 504+ is received.

MS. BOULEY: 505.

THE COURT: 505+ is received.

MS. BOULEY: 506.

THE COURT: 506+ is received.

MS. BOULEY: 507.

THE COURT: 507+ is received.

MS. BOULEY: 508.

THE COURT: 508+ is received.

MS. BOULEY: 509.

THE COURT: 509+ is received.

MS. BOULEY: 510.

THE COURT: 510+ is received.

MS. BOULEY: 511.

THE COURT: 511+ is received.

MS. BOULEY: 512.

THE COURT: 512+ is received.

MS. BOULEY: 513.

THE COURT: 513+ is received.

MR. AFFLECK: Hang -- hang on, Your Honor. We have no objection to the authenticity of these documents, but we would object on the grounds of relevance.

THE COURT: Which documents?

MR. AFFLECK: Notice of Interest filed by Michael Falk, Exhibit 513.

THE COURT: All right. So 513 is not received.

MS. BOULEY: Your Honor, will we be able to revisit that exhibit later?

THE COURT: Yes. Yes.

MS. BOULEY: Okay. Okay. 514.

MR. AFFLECK: Objection. Relevance.

THE COURT: All right. 514+ is not received at this time.

MS. BOULEY: Thank you, Your Honor. 515.

MR. AFFLECK: Objection. Relevance.

THE COURT: Not received at this time.
MS. BOULEY: 516.
MR. AFFLECK: No objection.
THE COURT: 516+ is received.
MS. BOULEY: 518.
THE COURT: 518+ is received.
MS. BOULEY: 520.
THE COURT: 520+ is received.
MS. BOULEY: 521.
THE COURT: 521+ is received.
MS. BOULEY: 526.
THE COURT: 526+ is received.
MS. BOULEY: 527.
THE COURT: Now, are 527 through 549 not objected to?
MR. AFFLECK: Your Honor, there may -- there may be some exhibits within those that are -- that we have an objection as to relevance only.
THE COURT: Which ones?
MR. AFFLECK: 528, 530, 531, 532, 534, 536, 540, 544, 545. I'm sorry. 544 no objection. No objection to 545 either. I'm sorry, Your Honor.
THE COURT: All right. Anything up to 549?
MR. AFFLECK: That's all of them up to 549.
THE COURT: All right. Now, Ms. Bouley, if you'll make sure that I say the right ones. The following documents are

received: 527, 529, 533, 535, 537, 538, 539, 541, 542, 543, 544, 545, 546, 547, 548, and 549.

MS. BOULEY: I believe that's correct, Your Honor.

THE COURT: All right.

MS. BOULEY: 551.

THE COURT: 551+is received.

MR. AFFLECK: Excuse me, Your Honor. We would object on grounds of relevance.

THE COURT: All right.

MS. BOULEY: 552.

MR. AFFLECK: Relevance.

THE COURT: 553.

MR. AFFLECK: Relevance.

THE COURT: 544.

MR. AFFLECK: Relevance.

THE COURT: 556.

MR. AFFLECK: Relevance.

THE COURT: 557.

MR. AFFLECK: Relevance.

THE COURT: 558.

MR. AFFLECK: Relevance.

THE COURT: 559.

MR. AFFLECK: Relevance.

THE COURT: 560.

MR. AFFLECK: Relevance.

THE COURT: 562.

MR. AFFLECK: Relevance.

THE COURT: 563.

MR. AFFLECK: Relevance.

THE COURT: 564.

MR. AFFLECK: Relevance.

THE COURT: 565.

MR. AFFLECK: Relevance.

THE COURT: 566.

MR. AFFLECK: Relevance.

THE COURT: 582.

MR. AFFLECK: Relevance.

THE COURT: 586.

MR. AFFLECK: Relevance.

THE COURT: 588.

MR. AFFLECK: Relevance.

THE COURT: 589.

MR. AFFLECK: Relevance.

THE COURT: 593.

MR. AFFLECK: Relevance.

THE COURT: 595.

MR. AFFLECK: Rele -- I think that's stipulated, Your Honor, but let's see here. Relevance. Otherwise, stipulated though.

THE COURT: Well, I'm either admitting it or I'm not, Mr. Affleck, contrary to what the documents are that have been filed.

MR. AFFLECK: Objection.

THE COURT: 597.

MR. AFFLECK: Relevance.

THE COURT: 598.

MR. AFFLECK: Relevance.

THE COURT: 599.

MR. AFFLECK: Relevance.

THE COURT: 600.

MR. AFFLECK: Relevance.

THE COURT: All right. Then, Ms. Bouley, you're certainly welcome to bring up the issue as your case progresses.

MS. BOULEY: All right. Thank you, Your Honor.

THE COURT: All right. You may call your first witness.

MR. AFFLECK: George Evan Bybee.

THE COURT: Sir, would you come forward and be sworn, please.

THE CLERK: Come and stand here, please. Answer into the microphone.

(Witness is sworn.)

THE CLERK: Please take the witness stand, and state your name and spell it for the record.

THE WITNESS: My name is George Evan Bybee. That's G-e-o-r-g-e, E-v-a-n, B as in boy, Y as in yoke, B as in boy, E as in echo, E as in echo.

DIRECT EXAMINATION +

BY MR. AFFLECK:

Q. Winterfox is an LLC. Correct?
A. That's correct, sir.
Q. And you are the manager of Winterfox?
A. That's correct, sir.
Q. Are you also the hundred percent owner?
A. No, sir.
Q. Who are the owners?
A. My wife and my family.
Q. And what percentages?
A. I believe it's -- well, there's a total of seven children, myself and my wife, and so it's one-ninths I believe.
Q. So each person has one-ninth each?
A. Yes, sir.
Q. And are you the sole manager of Winterfox?
A. Yes, sir.
Q. Is Winterfox currently in the lending business?
A. No, sir.
Q. But it was for a short time, wasn't it?
A. Yes, sir.

Q. Is that between 2003 and 2005?
A. Approximately.
Q. During that period, did Winterfox make approximately six loans?
A. Did it make what, sir?
Q. Approximately six loans.
A. I believe that's correct, sir.
Q. And that would be including the loan to Brian Kitts?
A. That's correct.
Q. Now, Winterfox was asked to produce all documents relating to these loans. Correct?
A. Yes, I was, sir.
Q. And Winterfox did so after the entry of a protective order to protect confidential information. Is that correct?
A. I believe so.
MR. AFFLECK: Your Honor, at this juncture I'd like to ask a few questions about materials that have been designated as confidential by Winterfox. The protective order issued by the Court indicates that anybody who hears or sees confidential information has to agree not to divulge that information, and I believe the -- Winterfox has requested that the record be sealed from the public view with respect to those questions. So I'm alerting the Court

that as of this moment, I want to ask some questions that would be covered by that confidentiality provision.

I know that Mr. Kitts, who is in the courtroom, has agreed to that confidentiality provision. Mr. Bird, who is in the courtroom, has not. Ms. Laurel Kitts, who is the Debtor's wife has not, and I would imagine that the court personnel will be deemed to have accepted that. But I would ask, Your Honor, if Winterfox requests that either Mr. Bird and Ms. Kitts agree to the confidentiality provisions of that order or that they be excused.

THE COURT: Counsel.

MR. JUBBER: Your Honor, yes, we would ask that they to be -- agree or be excused.

MR. AFFLECK: Your Honor, I would -- I would ask that Mr. Bird be permitted to agree to keep the information that he hears from this point on regarding loans that Winterfox made to persons other than Brian Kitts confidential, that it not be shared in any other context except in the context of this trial, and I would ask for Mr. Bird to consent to that at this point.

THE COURT: Mr. Bird, do you want to do that on the record if that's your intent?

MR. BIRD: So agreed, Your Honor.

MR. AFFLECK: And I would ask if Ms. Laurie Bird is -- or Laurie -- Laurie Kitts. I'm sorry, Your Honor. Her maiden name actually is Bird -- would also agree to the same.

THE COURT: Ma'am, if you're going to agree, I need you to come forward and say so on the record; otherwise, I'm going to ask you to step out.

MS. KITTS: I agree.

THE COURT: All right.

MR. AFFLECK: I assume that the court staff and the Marshal also agree, Your Honor.

THE COURT: The clerk staff and the Marshal service also agree, and the Ecro operator will be directed to indicate on the record the point at which you start and stop asking these questions.

MR. AFFLECK: I will try to indicate that. Now I will start.

(Confidential portion omitted.)

MR. AFFLECK: The confidential portion is over.

THE COURT: All right. Thank you.

MR. AFFLECK: I apologize.

THE COURT: I'm sorry, Mr. Bybee.

MR. AFFLECK: Probably over four questions ago.

Q. So Aaron Olivarez and Marco Fields are the persons that you were referencing?

A. That's correct.

Q. And they indicated to you that they had people at

times that were looking for loans you could lend money to?
A. They represented that they had people who came -- that Aaron was in that market, that people were coming to him all the time looking for investment loans, for investment properties and business purposes.
Q. Was it Aaron Olivarez who introduced you to the lending opportunities that we discussed a few minutes ago?
A. Yes, sir.
Q. Who let you know -- or who let Winterfox know that Mr. Kitts needed a loan? Was that also Aaron Olivarez?
A. I believe that is Aaron Olivarez.
Q. In connection -- and, in fact, Winterfox made loans through Brian Kitts, correct? In December? Two loans?
A. No. I believe we -- we made a loan to the business entity called Sun Peak.
Q. Okay. We'll get back to that question, but a loan was made --
A. I think you --
Q. -- that involved Brian Kitts?
A. I believe so.
Q. Okay. In connection with making that loan, did you ever speak with Brian Kitts?
A. No, sir.
Q. Who negotiated the terms of the -- well, I'll just

call it the Kitts loan. I know you might want to call it the Sun Peak loan, but I'll call it the Kitts loan, and that --

A. Okay.

Q. -- will be what I will call it.

A. Okay.

Q. Who negotiated the terms of the loan, or the Kitts loan, in behalf of Winterfox?

A. Principally, Aaron Olivarez.

Q. Who drafted the loan documents?

A. I believe Aaron Olivarez.

Q. Did you do an inspection of the home to evaluate its value as collateral?

A. Me personally, no.

Q. Who did that for you?

A. Aaron Olivarez and I believe Thomas Adams.

Q. What did you understand regarding the value of the property?

A. They presented to me that the value was, I believe 2.2 million with the additions to be made.

Q. And were you convinced that that was true?

A. I believe I was.

Q. Did they show you --

A. I had no reason to not believe them.

Q. Did they give you any information besides just their word? Show you comparables or --

A. No, they -- they did the --

Q. -- appraisals?

A. They reviewed comparables. I think there was -- I believe they had an appraiser review it, and I believe they went through the home themselves. That's what I was told.

Q. Now, you obtained title insurance for the loans, didn't you?

A. Say again.

Q. You obtained title insurance for the loans, didn't you?

A. I believe we did.

Q. Who assisted Winterfox in doing that?

A. That would have been Aaron Olivarez.

Q. Was Aaron Olivarez an employee of Winterfox?

A. Let me back up to that last question because I'm -- I guess I'm not certain, because I think that that title insurance may have been put on there by Mr. Kitts. But I'm -- it was in the -- the closing. So all I can say is I'm not positive whether I did or whether it was -- was done by Mr. Kitts. But I believe that it was part of the closing documents.

Q. Would you look at Exhibit 55, please.

THE COURT: Sir, you have some exhibit binders there that have --

MR. AFFLECK: May I approach the witness, Your Honor?
THE COURT: You may.
THE WITNESS: And if I open this up, where am I going to open it up to?
MR. AFFLECK: Tab 55.
Q. I'll represent to you that this is a loan policy of title insurance, and the name of the insured on the second page is Winterfox, LLC. Have you seen this document before?
A. Perhaps. It's nothing that I am familiar with.
Q. Does this refresh your recollection as to whether Winterfox obtained title insurance on the property?
A. Well, it says that it's insured.
Q. And the follow-up question was did you arrange for this title insurance policy or did someone do it on behalf of Winterfox?
A. I didn't personally do it, sir, so it must have been done for and on behalf of Winterfox.
Q. And do you know who did it? Who?
A. That's what I'm saying. I'm not -- I'm not certain whether Mr. Kitts did or whether Aaron Olivarez did it.
Q. Is there any reason that you can think of that Mr. Kitts would buy a title insurance policy for Winterfox?
A. Well, as part of the closing documents whatever --

many times who's going to pay for what is handled at the closing and prior to, and that's -- I'm just saying that's my -- my doubt, and I just don't know it personally.

Q. Okay. Fine. All right. Now, was Aaron Olivarez an employee of Winterfox?

A. No, sir.

Q. Was Marco Fields an employee of Winterfox?

A. No, sir.

Q. Did Marco Fields ever become an employee of Winterfox?

A. No, sir.

Q. Does Marco Fields work for Winterfox currently?

A. No, sir.

Q. What was the length or what -- for what time period did Marco Fields have a business relationship with Winterfox?

A. I don't know the date as much as I know I met her in -- as a mortgage person putting a mortgage together for a house that I had helped my one of my associates purchase, and I met her in that process, and that had to be in 2002-ish.

Q. And Marco had involvement with the loans that we talked about earlier today and this Brian Kitts loan?

A. She had some responsibility in the process. She wasn't the primary person. She aided in putting together looking at the comps and looking at it from a mortgage standpoint, and Aaron headed the team looking at the loans, he brought the loans, and Tom Adams was my brother-in-law who had a real estate background. And so I had asked him to look at things from his perspective and verify or validate what they were seeing.

And so it was -- that was the team that I had put together since I personally had no experience in the area and didn't trust my own abilities in an area that I don't have experience in.

Q. Was -- or were Aaron Olivarez and Marco Fields paid from the proceeds of the kit loan -- Kitts loan transaction?

A. I believe so.

Q. And what were they paid for? Why were they paid?

A. I don't know. I was not aware that I'm -- that -- in my memory, that Aaron was to receive anything from the loan proceeds. I was subsequently shown documents that said that he were -- that he was reimbursed. My understanding at the time was that when the loan was successful, then I would pay them a percentage of that, that successful loan in the -- it was a floating loan between one, two, three percent.

Q. I'd like you to turn to Exhibit 10 if you would.

A. 10? That's not in this book.

MR. AFFLECK: May I approach the witness, Your Honor?
THE COURT: You may.
Q. (BY MR. AFFLECK) This is a copy of the discovery responses that Winterfox provided to the Trustee in this case. Is -- is that your signature on the second to the last page? Or I'm sorry. It may not be the second to the last page. It would be the Bates number at the bottom right-hand corner. Kitts 20546.
A. 20546. Yes, sir, that's my signature.
MR. AFFLECK: I'd ask the Court to receive Exhibit 10.
THE COURT: Any objection?
MS. BOULEY: No objection, Your Honor.
THE COURT: Exhibit 10 is received.+
Q. (BY MR. AFFLECK) I'd like you to refer to page 16 of Exhibit 10, if you would, and your answer on behalf of Winterfox to Interrogatory No. 7. And I'll just read it to you.
"Identify all written disclosures given to you" --
A. Given by you.
Q. "Given by you," thank you, "to the Debtor prior to consummation of the first loan. Response: Documents labeled Bates Nos. Winterfox 1 through Winterfox 17 constitute the disclosures sent by Winterfox in connection with the first loan on December 5, 2004."
Did I read that correctly?

A. I believe so.
Q. And Interrogatory No. 8. "Identify all written disclosures given to you by the Debtor" --
A. Given by you.
Q. Thank you.
-- "given by you to the Debtor prior to consummation of the second loan. Response: The documents labeled with Bates Nos. Winterfox or WF18 through WR36 constitute the disclosures sent by Winterfox in connection with the second loan on December 29th, 2004."
Did I read that correctly?
A. Yes, you did.
Q. Now if you would turn, please, to Exhibit 7. In Exhibit 7, I'll represent to you, are the documents labeled Winterfox 1 through Winterfox 17.
A. Okay.
Q. And these are the documents referenced in the first interrogatory that I read to you. Correct? 1 through 17?
A. I believe that's correct.
MR. AFFLECK: I'd ask the Court to receive Exhibit 7 for the purpose of showing what disclosures were sent to the Debtor.
MS. BOULEY: And, Your Honor, we'd object on the grounds of hearsay. They haven't been authenticated.

There's a lack of foundation here. Mr. Bybee couldn't -- has not seen these, did not see these documents back at the -- back in December 2004. And, also, hearsay.

MR. AFFLECK: Your Honor, these documents are identified by Winterfox in its discovery responses as the documents that were sent to the Debtor in December 2004, prepared by Winterfox and sent by the Debtor. We are offering these for the purpose of showing what documents were prepared by Winterfox and allegedly sent to the Debtor.

THE COURT: All right. Counsel, is there some dispute that these are the documents that were referenced in the interrogatories?

MS. BOULEY: No, Your Honor. There's not. Not as to that one.

THE COURT: All right.

MS. BOULEY: We'd also object, Your Honor, on the grounds of relevancy; that Winterfox has already stipulated that Mr. Kitts did not receive his disclosures, and so this whole line of questioning, we would say, ought to be excluded under Rule 403 as just a waste of time. It's simply not relevant to the issues before the Court.

THE COURT: Trustee's Exhibit 7 is received.+

MR. AFFLECK: Thank you, Your Honor.

Q. If you'll turn to Exhibit 8, these are Winterfox documents labeled or identified as 18 through 36 which were

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identified in the second interrogatory that we read as the disclosures that were sent on December 29th, 2004. Are these the documents that you referenced in your discovery response?

A. I believe they were submitted in discovery, yes.

MR. AFFLECK: I would ask the Court to receive Exhibit 8.

MS. BOULEY: Your Honor, we have the same objections.

THE COURT: All right. Thank you. Exhibit 8 is received.+

Q. (BY MR. AFFLECK) Now, these disclosures and notices that are Exhibits 7 and 8, you didn't prepare those yourself, did you?

A. No, sir.

Q. They were prepared by Marco Fields. Is that your understanding?

A. I thought they were prepared by Aaron Olivarez.

Q. So it's your understanding that these disclosures were prepared by Aaron Olivarez?

A. Aaron or Marco, but I think Aaron was the -- the primary responsible person for the documentation.

Q. And do you know if Aaron Olivarez is the one who sent them to the Debtor or was that Marco Fields?

A. I don't know, sir.

Q. And during this time period that these were prepared and sent, Aaron Olivarez and Marco Fields were working on behalf of Winterfox. Is that right?

A. Well, they were working on behalf of themselves as consultants.

Q. And why do you say -- why do you use the word consultant?

A. Well, I'm trying to help you distinguish between the fact that -- that they weren't employees. They were simply consultants with their own interest at heart and to make certain they performed things properly which I asked them to do on behalf of Winterfox.

Q. So they were authorized to do things on behalf of Winterfox relating to these files?

A. They were asked to perform -- to produce the documents and perform all documentation properly.

Q. From the loan proceeds, Winterfox was paid $62,500. Is that right?

A. I believe so, sir.

Q. And what was that for?

A. That's referred to as points. That's interest that's paid up front out of the proceeds of the loan. In other words, I supply the same amount of money they return back to me.

Q. Would you look at Exhibit 56.

May I approach the witness, Your Honor?

THE COURT: You may.

THE WITNESS: What's that? Okay. Okay.

MR. AFFLECK: Your Honor, I believe this document --

THE COURT: It's already received.

MR. AFFLECK: -- is received into evidence.

Q. This is a settlement statement prepared in connection with the Kitts loan, and if you look on the second page, very top of the page, it indicates an origination fee of $87,500. Was the $62,500 that was paid to Winterfox designated in this settlement statement as an origination fee?

A. I don't know, sir.

Q. Do you know how much was paid to Aaron Olivarez and Michael Falk?

A. I have no idea.

Q. Isn't it true that it was $25,000?

A. I don't know, sir.

Q. I would represent to you, sir, that that is a stipulated fact --

A. Okay.

Q. -- in the pre-trial order in this case.

A. All right.

Q. So --

A. You asked me what I remembered, and I don't remember.

Q. Okay. I understand. 25,000 minus 87,500 is 62,500. Does that refresh your recollection as to why Winterfox was paid on this loan?

A. No, it doesn't refresh my recollection. I don't -- I wasn't aware that at the time Aaron Olivarez or Michael Falk received anything.

Q. Do you see anything else on this settlement statement that shows a payment to Winterfox in the amount of $62,500?

A. In the amount of what?

Q. $62,500.

MS. BOULEY: Objection. Assumes facts not in evidence.

THE COURT: Not that question. The objection's overruled.

THE WITNESS: So what's your question again, sir?

Q. (BY MR. AFFLECK) Is there anything in this settlement statement that shows a payment to Winterfox in the amount of $62,500? And I will represent to you, sir, that it is a stipulated fact that Winterfox received $62,500 from the proceeds of this loan.

A. Okay.

Q. And so I'm asking you: Is there anything on this settlement statement that shows why that amount was paid to Winterfox?

A. So then what's your question? I do not see a -- a

60 --

Q. Do you see a $62,500 payment there?

A. No, I don't, sir.

Q. Isn't it true that it was the norm for Winterfox to charge origination fees in the loans that it did?

A. Well, whether it was called an origination loan or the points, I probably knew it more as the term points. It was a, again, I didn't necessarily call it origination fee. I called it points. That was part of the negotiated interest rate and points at the time of the loan.

Q. You recall in your deposition being asked this question: Do you typically charge an origination fee for a hard money loan?

A. Yeah. Yes, I do.

Q. You recall --

A. Yes, sir.

Q. You recall your response?

A. I believe I said that Winterfox typically charged an origination fee. In reviewing that and thinking of that, at the time that I answered that, that sounded correct to call it an origination fee. I'm simply adding to that that you call it origination fee, but in my own mind and memory it was the points on the loan.

Q. So at the time of your deposition when you testified that you believed that it was typical for

Winterfox to charge an origination fee, you've thought about it it's -- and, in your mind, it's no longer an origination fee?

A. No, sir. I'm simply qualifying that calling it an origination fee is what I believe Mr. Millar referred to it as. In my mind I equated that with the points. And so to have a point of reference to talk about what the points were and calling it an origination fee, I'm not certain there's a difference. I don't know that there's a difference, but I'm explaining what I understood in my mind.

Q. Okay. Would you look at Exhibit 9, please. This is a letter from Russ Walker, who was Brian Kitts' attorney, to Gary Jubber. Gary Jubber was counsel for Winterfox in March 2006. Is that right?

A. Yes, sir.

Q. Have you ever seen this letter before today?

A. No, sir. I'd have to read it.

Q. Take a minute and look at it.

A. It's a lot of legal terms, sir, that I don't know that I personally read it, but I'm sure that my legal counsel did.

Q. My question was: Have you ever -- did you see this letter before or before this case was filed before this case was going?

A. Did I receive it before what?

Q. Did you receive this letter? Have you seen this letter before?

A. I believe if I had not seen it, I was informed of its contents.

Q. Okay.

A. In general terms.

Q. And do you remember what you were informed of?

MS. BOULEY: Objection, Your Honor. That would call for attorney-client communications. We'd only know this letter from attorneys.

MR. AFFLECK: Attorney-client privilege, Your Honor, applies when the information is being shared for the purpose of seeking legal advice by the client to the attorney and by the attorney to the client in giving legal advice. We are trying to establish Winterfox's notice through its manager of a claim by Brian Kitts that TILA disclosures were not made in connection with this loan. So we would submit, Your Honor, that it is not covered by the privilege and it is proper evidence to be received by the Court.

MS. BOULEY: Your Honor, there's -- there's no indication that, of course, Mr. Jubber is a manager of Winterfox, so I would also point out that Mr. Jubber was bankruptcy counsel at the time. He was not authorized to accept or receive correspondence on behalf of Winterfox for all purposes.

Also, you know, object to this line of question. Again, the letter is irrelevant. It was attached with the rescission claim that's now been dropped.

THE COURT: All right. I'm not going to require Mr. Bybee to disclose what his attorney told him regarding this letter, Counsel, so the objection's sustained.

Q. (BY MR. AFFLECK) At some point, did you become aware of a demand from Mr. Kitts that Winterfox provide him with disclosures that would have been given to him in connection with making the Kitts loans?

A. I remember at some point my counsel asking me if there was --

MS. BOULEY: Objection, Your Honor. Again, this is going to attorney-client communications.

THE COURT: Mr. Bybee, I think it's a yes or no answer.

THE WITNESS: Oh. Then state it again.

Q. (BY MR. AFFLECK) At some point did you become aware of a request or demand by Mr. Kitts that Winterfox supply him with copies of the Truth In Lending Act disclosures that were given to him in connection with the Kitts loans?

A. Yes.

Q. When did you become aware?

A. I don't know a time frame, sir. I know it was -- I believe it was in with -- connection with asking for all